

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 24, 2014

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2011AP1445-CR

Cir. Ct. No. 2008CF1

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW D. CAMPBELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dodge County: BRIAN A. PFITZINGER, Judge. *Affirmed.*

Before Blanchard, P.J., Higginbotham and Sherman, JJ.

¶1 HIGGINBOTHAM, J. Matthew D. Campbell appeals a judgment of conviction entered on jury verdicts of guilty on one count of second-degree sexual assault of a child, one count of use of a computer to facilitate a child sex crime, and one count of causing a child between thirteen and eighteen years old to

view sexual activity, and also appeals the order denying his motion for postconviction relief.¹ Campbell contends that he is entitled to a new trial because he received the ineffective assistance of trial counsel in several respects. For the reasons we explain, we affirm.

BACKGROUND

¶2 A criminal complaint was filed in Dodge County Circuit Court, charging Campbell with second-degree sexual assault of a child; use of a computer to facilitate a child sex crime; and causing a child between thirteen and eighteen years old to view sexual activity. The charges stem from allegations that Campbell used a computer to communicate to a fourteen-year-old girl that he wanted to have sexual contact with her and that he later went to the victim's home, where he had sexual contact with her.

¶3 A three-day jury trial was held. The principal witness called by the State was the victim. On the first day of trial, trial counsel asked the victim on cross-examination whether she expected that there would be any sexual contact between her and Campbell during their planned encounter at her home. The victim answered, "No." On the second day of trial, counsel continued his cross-examination of the victim. Counsel asked the victim to read to the jury portions of an Internet chat log containing the computer communications between Campbell and the victim. The only reasonable inference to be drawn from the excerpt of the

¹ Campbell also moves us to take judicial notice of the fact that trial counsel's license to practice law in Wisconsin has been revoked. We do not address Campbell's motion because the outcome of this appeal is not affected by whether we take judicial notice of the fact that trial counsel's license has been revoked. As we explain in this opinion, trial counsel did not provide ineffective assistance in this case.

chat log read by the victim was that the victim expected to have sexual contact with Campbell at her home. Counsel then cross-examined the victim as follows:

Q: Okay. Now you testified yesterday that you never at any time expected to have sex with [Campbell] or wanted to have sex with [Campbell], correct?

A: Yes.

Q: And are you testifying today that that was a lie?

A: I guess.

Q: Okay. You were under oath yesterday, is that right?

A: Yes.

Q: And you are under oath today, is that right?

A: Yes.

¶4 After the victim admitted to lying under oath, the trial court excused the jury from the courtroom and informed the victim that she had a constitutional right under the Fifth Amendment to remain silent and to not incriminate herself. Immediately thereafter, the prosecutor informed the court that, if the victim invoked her Fifth Amendment right to remain silent, he would move the court to grant the victim use and derivative immunity.² Without explicitly identifying the

² A court, on the motion of a district attorney, may compel a person to testify under WIS. STAT. § 972.08(1), and the person is immune from prosecution as provided in that section, subject to the restrictions under WIS. STAT. § 972.085. Under this form of immunity, the witness's "testimony and evidence derived from that testimony cannot be used in a later criminal prosecution against [the witness]." WIS JI—CRIMINAL 246. "Immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege.... It prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." *State ex rel. Tate v. Schwarz*, 2002 WI 127, ¶20 n.8, 257 Wis. 2d 40, 654 N.W.2d 438 (quoting *Kastigar v. United States*, 406 U.S. 441, 453 (1972)).

legal authority for the request, this was a clear reference to the court's authority under WIS. STAT. §§ 972.08 and 972.085 (2011-12).³ Consistent with the terms of these statutes, the prosecutor stated that, if the victim were "given use and derivative immunity ... and admits to crimes like perjuring herself yesterday [in the prior trial testimony], that can't be used against her." However, the prosecutor further explained, if after receiving immunity, during the course of further trial testimony, she lied under oath, then this new testimony could be used against her in a prosecution for perjury.

¶5 The jury was called back into the courtroom and trial counsel cross-examined the victim about whether she had lied at the preliminary hearing in this case in testifying that her Internet communications with Campbell did not contain sexual content. The victim then invoked her Fifth Amendment right against self-incrimination. The prosecutor moved for the court to grant her immunity, and trial counsel did not object. The court granted the motion. The court explained to the victim that she would no longer have a Fifth Amendment right to refuse to answer questions about her prior testimony because, "if you answer the question[s], the State ... has indicated that [it] will not prosecute you based upon your answers to the questions," with "a caveat" that "immunity is only good if you answer truthfully."

¶6 Trial counsel was then permitted to resume cross-examination. Counsel attacked the victim's credibility on cross-examination, questioning the victim about her prior testimony at the preliminary hearing in this case, her

³ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

testimony on direct examination at trial, and statements she made to police officers. This included highlighting inconsistencies and admissions by the victim that she had lied on various topics.

¶7 During the prosecutor's rebuttal closing argument, the prosecutor stated that the victim could be prosecuted for the perjured testimony she gave during her cross-examination, before she received immunity, but suggested that she probably would not be prosecuted for that testimony.

¶8 At no time after the victim invoked her Fifth Amendment right did trial counsel move to strike the victim's testimony to that point or request a cautionary jury instruction.

¶9 Campbell's primary defense was that he never had sexual contact with the victim and that the victim was lying in claiming that they had sexual contact. Campbell's secondary defense was that he was not guilty of using a computer to facilitate a child sex crime because, at the time Campbell communicated with the victim on the computer and went to her home, Campbell was under the effects of the medication Ambien. Trial counsel did not call an expert witness to testify about the side effects of Ambien, although it is uncontested that Campbell asked counsel to do so.

¶10 Campbell was convicted on all counts and filed a postconviction motion requesting a new trial on the ground that trial counsel was ineffective for several reasons. Following a *Machner*⁴ hearing, the court denied the motion. Campbell appeals.

⁴ *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

DISCUSSION

¶11 To succeed on a claim of ineffective assistance of counsel, Campbell must demonstrate that counsel’s representation was deficient and that the deficiency prejudiced him. *See State v. Erickson*, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). Both deficient performance and prejudice present mixed questions of fact and law. *State v. Jeannie M.P.*, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. We uphold the circuit court’s factual findings unless they are clearly erroneous. *State v. Thiel*, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. However, we review de novo whether counsel’s performance was deficient or prejudicial. *Jeannie M.P.*, 286 Wis. 2d 721, ¶6.

¶12 To prove deficient performance, Campbell must show that, under all of the circumstances, counsel’s specific acts or omissions fell “outside the wide range of professionally competent assistance.” *Strickland v. Washington*, 466 U.S. 668, 690 (1984). We review counsel’s strategic decisions with great deference because a strong presumption exists that counsel was reasonable in his or her performance. *Id.* at 689.

¶13 To prove prejudice, Campbell must establish “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694. Stated differently, the prejudice prong of the *Strickland* test is satisfied where the attorney’s error is of such magnitude that there is a reasonable probability that, absent the error, the result of the proceeding would have been different. *Id.*

¶14 If we conclude that the defendant has not proved one prong, we need not address the other. *State v. Nielsen*, 2001 WI App 192, ¶12, 247 Wis. 2d 466,

634 N.W.2d 325. Thus, if we conclude that Campbell failed to establish prejudice before the circuit court, we need not address deficient performance.

I. The Victim's Invocation of Fifth Amendment Right Against Self-Incrimination and Grant of Immunity

¶15 On the topic of immunity, Campbell contends that counsel was ineffective in three ways: (1) counsel failed to move to strike the testimony that the victim gave before she invoked her Fifth Amendment right against self-incrimination and the trial court granted the prosecutor's motion to give use and derivate immunity to the victim; (2) counsel failed to object and move for a mistrial when the prosecutor stated during his rebuttal closing argument that the victim could be prosecuted for the perjury she committed before she was granted immunity; and (3) counsel failed to request a cautionary jury instruction regarding the fact that the victim received immunity during trial. We address and reject each argument in turn.

A. Failure to Move to Strike Victim's Testimony

¶16 Campbell first contends that trial counsel was ineffective for not objecting to or moving to strike the victim's testimony as soon as she invoked her Fifth Amendment right on cross-examination. Campbell contends that Wisconsin law does not permit a witness to testify on direct examination and then invoke his or her Fifth Amendment right against self-incrimination on cross-examination, citing to numerous cases, including *Neely v. State*, 97 Wis. 2d 38, 292 N.W.2d 859 (1980), *State v. Monsoor*, 56 Wis. 2d 689, 203 N.W.2d 20 (1973), and *United States v. Cardillo*, 316 F.2d 606 (2d Cir. 1963). Campbell appears to suggest that, based on these cases, the court would have been compelled to strike the victim's

direct testimony had counsel moved to strike after the victim invoked her Fifth Amendment right. We reject his argument.

¶17 Campbell does not develop an argument on this topic with sufficient legal analysis and none of the cases that Campbell cites stand for the proposition for which they are cited. We ordinarily do not address undeveloped arguments that are not supported by the legal authority that is cited. See *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we may decline to address arguments that are inadequately briefed). However, we opt to now briefly address his argument, as best we understand it.

¶18 In general, the testimony of a witness who invokes the right against self-incrimination on cross-examination may be stricken in instances where the invocation of the right denies the defendant's right to confrontation, as secured by the Sixth Amendment to the United States Constitution. See *State v. Barreau*, 2002 WI App 198, ¶52, 257 Wis. 2d 203, 651 N.W.2d 12. Thus, we have stated that when a witness invokes the privilege against self-incrimination on cross examination,

courts must watch vigilantly to ensure that the invocation did not effectively emasculate the right of cross-examination itself. Therefore, when the privilege prevents a defendant from directly assailing the truth of the witness' testimony, it may be necessary in some cases to prohibit that witness from testifying or to strike portions of the testimony if the witness has already testified.

Id. (quoting other sources).

¶19 However, the facts that gave rise to the *Barreau* court's concern about denying a defendant's right to cross-examine a witness are not present in this case. Here, there is no dispute that, because the victim was granted immunity,

the victim's invocation of her Fifth Amendment right did not limit Campbell's right of cross-examination. As we have summarized above and the circuit court observed, Campbell was able to conduct a full cross-examination of the victim, where trial counsel persistently attacked the victim's credibility. Indeed, Campbell now concedes that trial counsel "did a very good job of challenging [the victim's] credibility." Thus, even if counsel moved to strike after the victim asserted her Fifth Amendment right not to incriminate herself, the court ultimately would have denied the motion because there was no basis in this case for striking the victim's testimony.

¶20 Campbell also contends that trial counsel was ineffective in failing to object to the court's grant of immunity to the victim on the ground that "immunity should not be given for perjury." In support for that proposition, Campbell merely cites to *Penister v. State*, 74 Wis. 2d 94, 246 N.W.2d 115 (1976), without providing any argument or legal analysis to support his contention, and without even referring to WIS. STAT. §§ 972.08(1) and 972.085. Moreover, contrary to Campbell's claim, the victim was not given immunity for the perjury she committed before being granted immunity. We do not consider this issue further. See *Pettit*, 171 Wis. 2d at 646.

¶21 Finally, Campbell argues that "there is no precedent for the grant of immunity for a State witness during the instant trial. The immunity process should be something raised pretrial based upon a witness saying before trial he or she will not testify because he or she plans to invoke the privilege." Campbell, once again, makes this assertion without any legal support or presenting a developed argument. In any event, the victim asserted her Fifth Amendment right only after she had commenced giving testimony at trial and therefore this was not an issue

that could have been addressed prior to trial. We do not further consider this argument. *See id.*

¶22 Based on the above, we conclude that Campbell has not demonstrated that trial counsel performed deficiently in failing to move to strike the victim's direct testimony after she invoked her Fifth Amendment right against self-incrimination. Simply put, trial counsel does not perform deficiently by failing to make a losing argument. *State v. Jacobsen*, 2014 WI App 13, ¶49, 352 Wis. 2d 409, 842 N.W.2d 365.

B. Failure to Object to Prosecutor's Rebuttal Closing Argument

¶23 Campbell argues that trial counsel's performance was deficient when counsel failed to object and move for a mistrial when the prosecutor allegedly mischaracterized the terms under which the victim was granted immunity during the prosecutor's rebuttal closing argument. We reject this argument as without merit.

¶24 Campbell's contention rests on the following passage:

Everything [the victim] said before I granted her immunity can be used against her. When she said [that she] lied yesterday, it's confession to perjury. It can be used against her. She does not have immunity from prosecution [for] that.

¶25 This is an accurate statement. The court's order did not purport to immunize the victim for testimony she gave *before* she received immunity. It is also a relevant statement. The State was calling attention to the fact that the State had offered no concessions to the victim in connection with her testimony before she was granted immunity.

C. Failure to Request a Cautionary Jury Instruction

¶26 Campbell next argues that trial counsel was ineffective for not requesting a jury instruction that Campbell asserts should be given in circumstances, such as this case, when a witness is immunized after invoking the privilege against self-incrimination. He argues that counsel's failure to request a curative instruction was not part of a trial strategy, based on counsel's testimony at the *Machner* hearing that he simply did not think to request an instruction.

¶27 We first observe that Campbell is not clear about the precise contents of the appropriate instruction under these circumstances, nor about the timing of any instruction that should have been given. The circuit court appears to have interpreted Campbell's postconviction claim to be that the court should have given an instruction immediately after the victim was granted immunity. The court reasoned that counsel was not ineffective for not requesting a curative instruction on the ground that taking the time to craft an instruction "would have completely interrupted the flow of what [counsel] was doing." It is not clear to us that Campbell has preserved his current argument because he failed to correct the circuit court that an instruction could have been given at the close of testimony when the court instructed the jury. However, we do not rest our decision on that point. It fails on other grounds.

¶28 Campbell fails to demonstrate that trial counsel was deficient in failing to request a curative instruction of some kind. Campbell bases his entire argument on *State v. Nerison*, 136 Wis. 2d 37, 401 N.W.2d 1 (1987), where the Wisconsin Supreme Court held that when an accomplice or co-conspirator of a defendant testifies against the defendant in exchange for prosecutorial concessions in his or her favor, the jury must be instructed "to carefully evaluate the weight

and credibility of the testimony of such witnesses who have been induced by agreements with the state to testify against the defendant.” *Id.* at 46. “[T]he purpose of the instruction is to warn the jury that the witness obtained some sort of concession in exchange for his or her testimony on the State’s behalf.” *State v. Miller*, 231 Wis. 2d 447, 466, 605 N.W.2d 567 (Ct. App. 1999).

¶29 As the State points out, however, the court in *Nerison* was careful to distinguish the facts in that case from a case such as the instant case: the witnesses there “were *not* immunized from perjury that they might commit at the defendant’s trial or at any time in the future,” but “were immunized from prosecution for perjury that occurred *prior* to the defendant’s trial.” *Nerison*, 136 Wis. 2d at 44-45 (emphasis added). The distinction makes all the difference. The victim in this case did not receive any benefit from the State other than the ability to testify truthfully after being immunized, and the jury was well aware of this fact and its implications. The jury was present in the courtroom when the court explained to the victim that she would be conferred immunity.

¶30 In addition, even if we were to assume deficient performance, we conclude that Campbell has not established that he was prejudiced. Because the jury understood that the victim was granted immunity and its implications, it is hard to see any particular instruction in this area making the slightest difference during jury deliberations.

II. Ambien Defense

¶31 Campbell contends that trial counsel was ineffective for failing to present a stronger defense that Campbell was under the influence of the sleeping aid Ambien during the chat room discussions with the victim and when he went to the victim’s home. He contends that counsel’s failure to present expert testimony

on the side effects of Ambien was not a reasonable strategic decision and was “devastating” to his defense because no evidence was presented to explain his behavior when he communicated with the victim on the Internet. Campbell points out that he asked counsel to obtain an expert to testify about the side effects of Ambien and that he provided counsel with the names of two such experts. Campbell also argues that counsel should have questioned Campbell’s ex-wife about Campbell’s use of Ambien and how it affected Campbell, and attempted to admit prescription records that would have shown that Campbell was taking Ambien during the relevant time period. We understand Campbell to argue that, had counsel more thoroughly developed an Ambien defense, there is a reasonable probability that the jury would not have convicted him of using a computer to facilitate a child sex crime.⁵

¶32 Campbell again fails to argue, let alone show, that he was prejudiced by counsel’s alleged deficient performance. The full extent of Campbell’s argument on prejudice is expressed in one sentence: “Failure to call an expert to show Campbell’s testimony to be credible in this regard was deficient and prejudicial.” Such a conclusory statement is not a developed argument.

¶33 In any event, even if Campbell had developed an Ambien defense in the ways that Campbell suggests, we conclude that there is not a reasonable probability that the jury would have acquitted Campbell of using a computer to facilitate a child sex crime.

⁵ Campbell does not appear to argue that, had trial counsel more thoroughly developed an Ambien defense, he would not have been convicted of the crimes of second-degree sexual assault of a child and causing a child between thirteen and eighteen to view sexual activity. Campbell does not contend that effective assistance against those crimes should have included his Ambien defense.

¶34 To prove that Campbell was guilty of this offense, the State was required to present evidence establishing beyond a reasonable doubt that Campbell: used a computer to communicate with the victim; believed or had reason to believe that the victim was under the age of sixteen years old; had the intent to have sexual contact with the victim; and did an act, in addition to using the computer, to carry out the intent to have sexual contact with the victim. *See* WIS JI—CRIMINAL 2135. Campbell did not dispute that he used a computer to communicate with the victim. However, counsel argued at trial that Campbell's conduct did not meet the other elements of the crime.

¶35 As to whether Campbell knew or had reason to know that the victim was under sixteen years old, Campbell testified that it was "highly likely" that he had viewed an online profile in which the victim listed her age as thirteen and agreed that the victim's profile provided reason to believe that the victim was under sixteen years old. Moreover, during the online communications between Campbell and the victim, Campbell commented to the victim that she was "so young" and Campbell expressed fear of criminal consequences if the two had sexual contact. A reasonable jury would view this undisputed evidence as establishing that Campbell knew or had reason to know that the victim was under sixteen years old.

¶36 As to the intent element, the Internet chat logs of the communications between Campbell and the victim provide undisputed evidence that Campbell had an intent to have sexual contact with the victim when he communicated with her on the computer. In those chat logs, Campbell graphically described the sexual conduct he wanted to engage in with the victim and expressed fear that he could go to jail if he were caught having sexual contact with the victim, evidencing a guilty state of mind. Campbell also wrote to the victim that,

“[w]e could always just take some sleeping pills I have and take the best nap ever tomorrow,” suggesting that Campbell considered giving the victim Ambien to facilitate sexual contact between them. This objective, undisputed evidence establishes that Campbell formed an intent to have sexual contact with the victim.

¶37 As to the final element, Campbell testified at trial that he met the victim at her home and later followed the victim into her bedroom. Although Campbell denied that he had sexual contact with the victim, Campbell’s own testimony that he went to the victim’s home satisfies the additional act element.

¶38 In sum, because the undisputed evidence strongly supports a jury finding that Campbell used a computer to facilitate a child sex crime, we conclude that Campbell was not prejudiced by counsel’s failure to more thoroughly develop an Ambien defense.

III. Failure to Obtain Cell Phone Records and Interview Potential Defense Witnesses

¶39 Campbell contends that trial counsel was ineffective because counsel never obtained cell phone records that would have proved that the victim lied when she testified that she received only one phone call from her mother on the day that Campbell was at the victim’s home. Campbell contends that using the cell phone records to show that the victim lied about the number of cell phone calls she received from her mother would have cast additional doubt on the victim’s credibility and therefore counsel was ineffective in failing to obtain the cell phone records. We disagree. It is difficult to conceive how the victim’s credibility could have been more than marginally damaged by this evidence, especially in light of trial counsel’s aggressive cross-examination of the victim. In

short, Campbell has not demonstrated how he was prejudiced by counsel's failure to obtain the cell phone records.

¶40 Campbell also argues that counsel was ineffective for failing to interview two potential defense witnesses regarding the victim's lack of credibility. However, Campbell fails to develop any argument on the topic, such as what these witnesses would have testified to and how this testimony would have changed the outcome of the case. Thus, we do not address the argument. *See Pettit*, 171 Wis. 2d at 646.

IV. Counsel Misunderstood the Elements of Using a Computer to Facilitate a Child Sex Crime

¶41 Finally, Campbell contends that trial counsel was ineffective because counsel pursued a defense strategy that rested on an erroneous belief that, if the jury found that Campbell did not have sexual contact with the victim, this was a defense to the charge of using a computer to facilitate a child sex crime. Campbell contends that it was only after the jury was deliberating that counsel realized that Campbell could be convicted of the crime even if Campbell did not actually have sexual contact with the victim. We understand Campbell to be arguing that counsel failed to understand the elements of the crime of using a computer to facilitate a child sex crime.

¶42 We are satisfied that trial counsel was fully aware of the elements of using a computer to facilitate a child sex crime. Counsel demonstrated at various times throughout the proceedings in this case that he understood the elements of the crime. For instance, during the hearing on the motions in limine, which was held a couple days before the trial, trial counsel stated to the court:

The elements of th[e] offense [of using a computer to facilitate a child sex crime] include obviously using a

computer to communicate [with another], but also that the accused believes or has reason to believe that the person with whom he's communicating has not attained the age of 16 and that [the accused's] communication [with the other person] is with the intent to have sexual contact.

In addition, our reading of the trial transcript reveals that counsel did not misrepresent the elements of this charge to the jury during his closing argument. Trial counsel never suggested to the jury during closing argument that not having sex with the victim was a defense to the crime.

¶43 Counsel did argue during closing argument that, “the best evidence of [Campbell's] [lack of] intent is the fact that it never happened. There never was any sexual contact.... If that is what he had intended, then it would have happened; but it didn't.” We understand counsel to have argued that Campbell's alleged lack of actual sexual contact with the victim created reasonable doubt that Campbell *intended* to have sexual contact with the victim when he communicated with her on the computer. We do not read this part of counsel's argument as indicating that, because Campbell testified that he did not have sexual contact with the victim, Campbell could not be found guilty of the crime. Rather, this argument appears to us to have been a valid one for the defense to have offered to the jury. While defense counsel's argument did not ultimately succeed, it does not follow that counsel's strategy was unreasonable. “Effective representation is not to be equated, as some accused believe, with a not-guilty verdict.” *State v. Harper*, 57 Wis.2d 543, 557, 205 N.W.2d 1 (1973). Accordingly, we reject Campbell's contention that counsel's performance was deficient.

CONCLUSION

¶44 Based on the above, we conclude that Campbell has not demonstrated that he received the ineffective assistance of trial counsel. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

